

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-671

CECILIA ESPINOZA AND RUDOLFO ESPINOZA, PETITIONERS

v.

FARAH MANUFACTURING Co., INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

STATEMENT

This memorandum is submitted in response to an order of this Court, entered on January 8, 1973, inviting the Solicitor General to file a brief expressing the views of the United States in this case.

The question presented is whether an employer's refusal to hire a lawful resident alien because that person is not a citizen of the United States constitutes employment discrimination on the basis of "national origin," in violation of Section 703 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2.

Section 703(a)(1) of Title VII, 42 U.S.C. 2000e-2 (a)(1), states in pertinent part:

(1)

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual * * * because of such individual's * * * national origin * * *.

Respondent Company is a manufacturer of clothing (Pet. App. 10a). Petitioner Cecilia Espinoza¹ is a lawfully admitted resident alien living in San Antonio, Texas, and is of Mexican ancestry (Pet. App. 2a). She applied for employment at the Company's San Antonio division in July 1969; the Company rejected her application on the basis of its long-standing policy, established by the Company's founder, that it would hire and employ only United States citizens (*ibid.*). Nevertheless, as the district court found, "persons of Mexican ancestry make up more than 92 percent of [the Company's] total employees, 96 percent of its San Antonio employees, and 97 percent of people doing the work for which [petitioner] applied * * *" (Pet App. 11a).

Petitioner then filed a charge with the Equal Employment Opportunity Commission (EEOC), alleging that the Company had discriminated against her on the basis of national origin in violation of Title VII of the Civil Rights Act of 1964 (Pet. App. 2a). The EEOC Regional Director found that petitioner had not been denied employment because she is Spanish surnamed, but authorized her to sue in federal court because "no administrative solution to the complaint was forthcoming" (*ibid.*).

¹ Hereinafter "petitioner."

The district court granted petitioner's motion for summary judgment, holding that the Company's refusal to hire her because she was not a United States citizen constituted discrimination on account of "national origin" within the meaning of Section 703(a) of the Act, 42 U.S.C. 2000e-2(a) (Pet. App. 10a-15a). The court relied in part on EEOC's Guideline, promulgated in January 1970,² which provides:

Because discrimination on the basis of citizenship has the effect of discriminating on the basis of national origin, a lawfully immigrated alien who is domiciled or residing in this country may not be discriminated against on the basis of his citizenship, except that it is not an unlawful employment practice for an employer, pursuant to section 703(g), to refuse to employ any person who does not fulfill the requirements imposed in the interests of national security pursuant to any statute of the United States or any Executive order of the President respecting the particular position or the particular premises in question. [29 C.F.R. 1606.1(d).]

The court of appeals reversed, finding that petitioner was "denied an opportunity for employment because she lacks United States citizenship, and for no other reason" (Pet. App. 3a) and that "[n]either the language of the Act, nor its history, nor the specific facts of this case persuade us that such a refusal has been condemned by Congress" (Pet. App. 5a). The court agreed, however, that "in many situations discrimination on the basis of citizenship would in-

² 35 Fed. Reg. 421 (January 13, 1970).

deed be banned by the Act, *e.g.*, where such a practice is symptomatic of or a necessary element within prohibited national origin discrimination, or where it is a mere pretense to camouflage national origin discrimination. In such situations we would find this [EEOC] regulation enforceable as a proper effectuation of the Act. However, no such situation exists here" (Pet. App. 6a). The court denied a petition for rehearing and for rehearing *en banc*.

DISCUSSION

By Executive Order since 1943³ and by Act of Congress since 1964,⁴ the federal government, as employer, has been prohibited from discriminating on the basis of "national origin." However, regulations of the Civil Service Commission have, since 1914, prohibited the employment of non-citizens in the federal competitive service.⁵ And in various appropriation Acts, Congress has forbidden the use of appropriated funds for the payment of non-citizen employees of the federal government.⁶

³ Exec. Order 9346, 8 Fed. Reg. 7183 (1943); Exec. Order 10308, 16 Fed. Reg. 12303 (1951); Exec. Order 10479, 18 Fed. Reg. 4899 (1953); Exec. Order 10925, 26 Fed. Reg. 1977 (1961); Exec. Order 11246, 30 Fed. Reg. 12319 (1965); Exec. Order 11478, 34 Fed. Reg. 12985 (1969).

⁴ 5 U.S.C. 7151, originally enacted as Section 701(b) of Title VII of the Civil Rights Act of 1964.

⁵ 5 C.F.R. 338.101.

⁶ See, *e.g.*, Public Works Appropriation Act, 1970, P.L. 91-144, Section 502, 83 Stat. 336-337; Treasury, Postal Service,

Thus, with respect to federal employment, the United States agrees with the interpretation of "national origin" by the court below since the federal government in its employment practices and Congress in appropriation Acts have construed the phrase to mean ancestry rather than citizenship.⁷ We recognize, as did the court of appeals (Pet. App. 6a), that in some instances a requirement of United States citizenship might well constitute a subterfuge for dis-

and General Government Appropriation Act, 1973, P.L. 92-351, Section 602, 86 Stat. 487.

These Civil Service Commission regulations and congressional appropriation Acts are currently under challenge as allegedly discriminating against aliens in violation of the Due Process Clause of the Fifth Amendment. See *Jalil v. Hampton*, No. 71-1574, certiorari denied, 409 U.S. 887 (the case has been remanded to the district court for an evidentiary hearing on this issue).

Currently before the Court is a case presenting the question of whether a State, as employer, is prohibited by the Equal Protection Clause of the Fourteenth Amendment from requiring United States citizenship as a prerequisite to employment. *Sugarman v. Dougall*, No. 71-1222, probable jurisdiction noted, 407 U.S. 908, argued January 8, 1973.

⁷ Congress presumably intended the phrase "national origin" to have the same meaning in Section 703(a)(1) of the 1964 Civil Rights Act, which is involved in this case, as in Section 701(b) of the same Act, which applied to the federal government as employer and which is now 5 U.S.C. 7151.

Apparently, the only legislative history regarding the meaning of "national origin" is the statement of Congressman Roosevelt, Chairman of the House Subcommittee reporting the bill, which the court below quoted (Pet. App. 4a):

"May I just make very clear that 'national origin' means national. It means the country from which you or your forebears came from. You may come from Poland, Czechoslovakia, England, France, or any other country." [110 Cong. Rec. 2548-2549.]

crimination on the basis of national origin. If a citizenship requirement were used in such a manner, it would be contrary to the purpose of title VII—"to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees * * *." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-430. And this would clearly entail the kind of discrimination forbidden by the Act, as interpreted in the EEOC Guideline referred to above.

But in the present case the record does not suggest that the Company was using the citizenship requirement as such a subterfuge since more than ninety percent of its employees are of Mexican origin. Therefore, this is not a case that presents the kind of practices that Title VII of the Act and the EEOC Guideline were intended to prevent.

In addition to the atypical factual situation presented here, which makes this a poor case to determine the validity of the EEOC Guideline and the interpretation of the Act it embodies, this is the first opinion by a court of appeals on this issue. There is thus no conflict in the circuits and the United States believes that other courts of appeals ought to be given the opportunity to consider the matter before this Court grants review, particularly since the employment practices of the federal government, which the Company relies upon, are currently undergoing judicial review, as we noted above, see p. 5, n. 6, *supra*, and

may be affected by this Court's decision in *Sugarman v. Dougall, supra*, n. 6.^a

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

J. STANLEY POTTINGER,
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^a In light of these factors, the Equal Employment Opportunity Commission agrees that this is not an appropriate case in which to test the validity of its Guideline and that this Court should not undertake to review the question at this time. However, EEOC adheres to the view, expressed in its Guideline, that discrimination on the basis of citizenship has the effect of discrimination on the basis of national origin. While persons born in this country automatically obtain citizenship at birth, individuals born elsewhere can acquire citizenship only through a long and sometimes difficult process (see, e.g., 8 U.S.C. 1423, 1427(a), 1430). The Company's citizenship requirement thus creates two different and unequal standards for employment; the native-born are automatically eligible for employment while those born elsewhere are eligible for employment only after they have completed the required period of residency and passed the proficiency tests in English and civics. The Company's practice therefore discriminates against individuals on account of their place of birth and has the inevitable effect of placing persons who come from another country at a disadvantage.